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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1294

D/S A/S SVERRE,
Petitioner,

vs.

TEXPORTS STEVEDORE CO., INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EDWARD W. WATSON
Counsel for Petitioner, D/S A/S Sverre
521 U. S. National Bank Building
Galveston, Texas 77550

Of Counsel:
EASTHAM, WATSON, DALE & FORNEY
521 U. S. National Bank Building
Galveston, Texas 77550

E. L. MERRENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-2020

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Petitioner, D/S A/S Sverre, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming a judgment entered by the United States District Court for the Southern District of Texas in favor of Respondent, Texports Stevedore Co., Inc.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law entered by the District Court are printed in Appendix A, and are reported in 1966 A.M.C. at page 2032. The Judgment entered by the District Court is printed in Appendix B, and is unreported. The opinion of the Court of Appeals is printed in Appendix C, and is reported at 387 F. 2d 648.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 9, 1968. No motion for rehearing is pending.

The jurisdiction of the Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. In a suit by a shipowner seeking indemnity from a stevedore what is the measure of "conduct on its part sufficient to preclude indemnity". (*Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U.S. 563).

2. Is conduct precluding indemnity on the part of a shipowner not limited to that which at least prevents or seriously hinders the stevedore's performance of a workmanlike service.

3. Can the shipowner's negligence in supplying defective or unseaworthy equipment of itself constitute conduct precluding indemnity without regard to the quality of the stevedore's performance.

STATUTES INVOLVED

There are no statutes directly involved in this case. The Longshoremen's & Harbor Workers Act is collaterally involved.

STATEMENT OF THE CASE

This suit was brought by petitioner, a shipowner, against respondent, a contract stevedore, asking indemnity for damages paid a longshoreman employee of respondent for personal injuries. The admiralty and maritime jurisdiction of the Federal Courts was the basis for jurisdiction

in the Court of first instance, and this suit was filed as a libel in admiralty prior to the amendment of the Rules of Civil Procedure on July 1, 1966.

The injured longshoreman, Maples, fell from a fixed ladder on petitioner's vessel, ATNA, as he was descending into the hold to commence work, and was seriously injured. Maples filed suit against petitioner, as a civil jury action in the United States District Court, at Houston. Petitioner did not implead respondent in Maples' suit but tendered the defense of that suit to Respondent, which tender was declined. In answer to interrogatories in Maples' suit the jury found that the ladder on ATNA which Maples was descending was "negligently designed or constructed" and this was a cause of the injury. The jury also found that Maples' own negligence was a contributing cause of his injury, to the extent of 40%. Total damages were set at $295,498.55, and judgment entered against petitioner for this amount less the 40%, or in the sum of $177,299.31.

Having paid this judgment petitioner filed the present libel against respondent for indemnity covering the judgment paid and petitioner's costs in defending Maples' suit. Petitioner alleged that respondent had breached its implied warranty of workmanlike service as a contract stevedore by failing to open hatches or otherwise provide sufficient lighting for the ladder which Maples was using, as well as through Maples' own negligence, and this caused the accident by bringing into play any hazards presented by the ladder.

Trial of the initial suit by Maples had been before the Honorable Allen B. Hannay, District Judge. Trial of the instant indemnity action was before the Honorable Joe E. Estes, District Judge, but used only the transcribed testimony or depositions which had been given in the initial

suit by Maples. No witnesses appeared before Judge Estes and no new evidence was offered.

The Findings of Fact and Conclusions of Law entered by the District Court in this indemnity action (Appendix A) say that the stevedore did not breach its warranty of workmanlike service and that the shipowner's furnishing of the negligently designed and constructed access way and ladder which was a proximate cause of Maples' injury was conduct on the part of the shipowner sufficient to preclude its recovery of indemnity from the stevedoring company. The Court of Appeals, per curiam, has affirmed that judgment by considering only the question "whether there was sufficient evidence before the trial Court which would warrant its finding that the conduct on the part of the shipowner was such as would preclude its recovery of indemnity against a contract stevedore". It concluded that, having considered the evidence as to the construction of the access into the hold, it could not reverse as clearly erroneous the trial court's judgment that "it is just exactly the sort of conduct that precludes the shipowner from recovery" (Appendix C).

REASONS FOR GRANTING THE WRIT

This case presents unresolved questions of Federal law having importance to the maritime industry. Since *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic Steamship Corp.*, 350 U.S. 124, 100 L. Ed. 133 (1956), the proliferating litigation of indemnity issues between shipowner and stevedore has been a major factor in allocating the losses from maritime injuries. Since the statement in *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.*, 355 U.S. 563, 2 L. Ed. 2d 491 (1958), that a shipowner may be entitled to indemnity "absent conduct on its part sufficient to preclude indemnity" the Courts of Appeal and the Dis-

trict Courts have had increasing concern with the proper definition of that "conduct", although sometimes even confessing to confusion in the absence of further indications from this Court. Cf. *H. & H. Ship Service Co.* v. *Weyerhaeuser Line*, 9 C.A. 1967, 382 F. 2d 711, at 713.

As will be shown, the Court of Appeals for the Fifth Circuit has in the instant case rendered a decision on "conduct precluding indemnity" in this context which is in obvious conflict with the decisions by the Courts of Appeals in the 2nd, 4th and 9th Circuits on the same subject. This decision also appears in probable conflict with premises which may be drawn from the decisions of this Court in *Crumady* v. *The J. H. Fisser*, 358 U.S. 423, 3 L. Ed. 2d 413 (1959), and *Waterman Steamship Corporation* v. *Dugan & McNamara, Inc.*, 364 U.S. 421, 5 L. Ed. 2d 169 (1960), allowing indemnity against a stevedore for bringing into play defective equipment supplied by the shipowner. However, in neither instance were the questions here directly posed or answered.

The immediate problems brought on by this petition are questions of law. To whatever extent any factual issues may be material to the consideration of those questions this case offers the unusual advantage that factual review is freed from the inhibitions rested upon the better opportunity of a Court below to assess the relative credibility of the witnesses. No witness faced this Trial Court, all evidence produced there was transcribed from testimony given in a different case before a different Judge, and the record brought to this Court is the same in kind as well as content as that upon which this case was first decided.

ARGUMENT

Petitioner's ship, the ATNA, was a relatively new dry-cargo vessel of shelter-deck construction. On this latter account the ladders providing access to the 'tween deck and lower hold were not located in the square of the hatchways, and access to Nos. 1, 2, and 3 holds was provided by two vertical ladders, one on the port side and one on the starboard side, entered through the masthouse between Holds 1 and 2. The uppermost section of each ladder was encased in a trunk as far as the 'tween deck, where an access door led to that deck, and the lower section of each ladder, not encased, then continued into the lower hold. The injured longshoreman was descending this ladder to reach the 'tween deck when he fell down the ladder and into the lower hold.

Appendix D reproduces three photographs from exhibits used in this case which fairly illustrate this access way and point out the features of construction deemed negligent. Photo D-1 is the view down the ladder from the masthouse. Photo D-2 is the door opening from the ladder onto the 'tween deck. Photo D-3 shows the lower two rungs of the upper ladder section, and the side-pieces and upper several rungs of the lower ladder section, at the level of the 'tween deck and immediately inside the door opening seen in D-2. While the injured longshoreman was unable to relate what caused him to fall it was theorized that in order to go under the fixed bar that was across the door he had stepped down onto the side-piece of the lower ladder rather than its top rung, and his foot then slipped off. Expert evidence had been given that it was unsafe to have that fixed bar across the door, to have a spacing of approximately 15 inches between lowest rung of upper ladder and top rung of lower ladder when the spacing between rungs above was only 11 inches,

and to have the top of the left side piece of the lower ladder directly below the left four inches of the lowest rung of the upper ladder, and approximately 11 inches below that rung.

Furnishing an access way with these items of construction or design was characterized by the Trial Court as "just exactly the kind of conduct" which precludes the shipowner from recovering indemnity. Nothing else was involved. It was undisputed that there was no dirt, greasy or slippery substance on the ladders, and nothing broke or gave away.

It was also undisputed that prior to this mishap not only the ship's personnel but hundreds of longshoremen in dozens of different ports had used these same ladders, in the same condition, and over a period of three years, without incident. The accident to Maples occurred while the hatches adjacent to this access way were still in process of being opened. The shipowner contended that any hazards presented by these constructional peculiarities were brought into play by the stevedore's failure to abide by the Safety Rules and keep his men out until hatches were fully opened and ample lighting provided, as well as by Maples' own negligence in venturing into an unknown area before it was safe and proper to do so. While the Trial Court found that hatches were "open enough to provide sufficient light" the testimony of at least five out of the six men who were on the 'tween deck when Maples fell described the lighting at that time and place in terms ranging from "like a night without a moon" to "so dark down there I couldn't even make him out, just the outline of him (referring to a man just a few feet away)". And the stevedore's own superintendent found no reason to discontinue the use of this access way after the accident *when sufficient lighting had been provided.* The Court of Appeals did not pass on the question of hatches and lighting

in finding the Trial Court not clearly erroneous in holding there was conduct precluding indemnity. The standard of law used by Trial Court and Court of Appeals in this determination is thus clearly brought into question.

In their own effort to find a proper measure for conduct precluding indemnity the Courts of Appeals in the 2nd, 4th and 9th Circuits have formulated a statement, and followed the rule, that indemnity is not precluded unless the vessel owner's conduct shall at least "prevent or seriously handicap the stevedore in doing a workmanlike job". The representative and more recent cases are:

In the Second Circuit: *Albanese* v. *N.V. Nederl. Amerik Stoomv. Maats,* 2 C.A. 1965, 346 F. 2d 481, cert. den., on indemnity issue, 382 U.S. 283, 15 L. Ed. 2d 327; *Mortensen* v. *A/S Glittre,* 2 C.A. 1965, 348 F. 2d 383.

In the Fourth Circuit: *Calmar Steamship Corp.* v. *Nacirema Operating Company,* 4 C.A. 1959, 266 F. 2d 79, cert. den. 361 U.S. 816, 4 L. Ed. 2d 62; *Old Dominion Stevedoring Corp.* v. *Polskie Linie Ocean.,* 4 C.A. 1967, 386 F. 2d 193.

In the Ninth Circuit: *Rederi A/B Nordstjerman* v. *Crescent Wharf & Warehouse Co.,* 9 C.A. 1967, 372 F. 2d 674; *H. & H. Ship Service Co.* v. *Weyerhaeuser Line,* 9 C.A. 1967, 382 F. 2d 711.

Prior to the instant case the Court of Appeals for the Fifth Circuit, in *Waterman Steamship Corp.* v. *David,* 5 C.A. 1965, 353 F. 2d 660, cert. den. 384 U.S. 972, 16 L. Ed. 2d 683, saw no inconsistency in a jury's verdict which, after finding that a vessel's unseaworthiness had been brought into play by the stevedore's negligence, further found that the stevedore had not breached its warranty of workmanlike service, and that the vessel's unseaworthiness was "so

great as to preclude it from a recovery" of indemnity. While the Court in *David* recognized that the "Weyerhaeuser Dictum" was to be interpreted according to contract principles it left the responsibility for that result with the jury. In a later case in the Fifth Circuit, *Comp. Anon. Venezolano de Navegacion* v. *Matthews*, 5 C.A. 1967, 371 F. 2d 971, conduct precluding indemnity was affirmed where the shipowner had determined the conditions under which work was to be done and had ordered the stevedore to proceed with work under those conditions.

The instant case is unlike *Matthews*, as the respondent here determined when its men should use the access way to go below, and is not clouded by the duty to harmonize a jury's answers, if possible, as was the case in *David*. Here in each Court below the shipowner's negligence in design or construction of the access way has been held to be all that was necessary to preclude indemnity, and without consideration whether that prevented or seriously handicapped the stevedore's workmanlike performance. That this shipowner's conduct did not in any way prevent or hinder the stevedore's compliance with local and Federal Safety Rules directing that longshoremen should not be permitted to enter holds until hatches were removed or other means used to provide sufficient light is beyond dispute. And the causal connection between a breach of those rules and this accident is not only implicit but is found in the admission by respondent's superintendent who, after the accident, did not consider the ladders unsafe if there was sufficient light (R. 95-97).

A conflict between decisions of the 5th Circuit and those of the 2nd, 4th and 9th Circuits if only forecast in *David* is now clearly achieved by the instant case. This conflict is not reflected by a questionable finding of fact but by a failure to weight obvious facts in the same scale

of law heretofore adopted by the other three circuits. The resolution of this conflict in the maritime law is critical to maintenance of uniformity between the circuits.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD W. WATSON
Counsel for Petitioner, D/S A/S Sverre
521 U. S. National Bank Building
Galveston, Texas 77550

Of Counsel:
EASTHAM, WATSON, DALE & FORNEY
521 U. S. National Bank Building
Galveston, Texas 77550

CERTIFICATE

I hereby certify that copies of the foregoing petition have been served upon E. D. Vickery, Esq., of Royston, Rayzor & Cook, counsel for respondent by placing the same in the United States Mail, postage prepaid and properly addressed.

EDWARD W. WATSON

Dated:

3 April 1968